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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY_____
DEPUTY

No. 84856-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER OLSEN,

Petitioner.

COURT OF APPEALS
STATE OF WASHINGTON
2011 FEB -1 AM 8:12
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ON DISCRETIONARY REVIEW FROM THE
COURT OF APPEALS. DIVISION II

Court of Appeals No. 38104-4-II
(Consolidated with 38034-0-II)
Thurston County Superior Court No. 07-1-01363-0

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. INTRODUCTION.

Petitioner Christopher Olsen and Michael Sublett were tried in a consolidated trial on charges of first degree murder with premeditation or, in the alternative, murder committed in the course of, furtherance of, or immediate flight from first degree burglary or either first or second degree robbery. The jury found Sublett guilty on both alternatives, but convicted Olsen only on the felony murder alternative.

Both Sublett and Olsen appealed their convictions to Division II of the Court of Appeals. Those convictions were affirmed. State v. Sublett, 156 Wn. App. 160, 231 P.3d 231 (2010). Christopher Olsen petitioned for discretionary review in this court; review was granted.

B. ISSUES.

1. Whether the trial court's instructions on felony murder and accomplice liability permitted the jury to convict Olsen of felony murder even if he was not an accomplice at the time the killing occurred.

2. Whether Olsen's state or federal constitutional rights were violated by the trial court's refusal to instruct the jury on second degree manslaughter as a lesser-included offense of either first degree premeditated murder or first degree felony murder.

3. Whether defense counsel provided ineffective assistance by proposing a non-standard instruction for the lesser-included offense of second degree manslaughter and for failing to propose

instructions for lesser-included offenses of first degree manslaughter and second degree murder.

4. Whether Olsen's right to a public trial under both the state and federal constitutions was violated by the trial court's response to a jury question.

5. Whether the trial court's refusal to provide supplemental jury instructions following a jury question violated Olsen's Fourteenth Amendment right to due process.

6. Whether the trial court correctly denied Olsen's motion for a new trial on his claimed grounds of newly discovered evidence.

7. Whether the trial court correctly admitted unedited recordings of telephone calls between Olsen and April Frazier.

8. Whether the trial court correctly excluded evidence of a conversation between the victim and his neighbor.

9. Whether it was error for the trial court to answer a question from the jury in Olsen's absence.

C. STATEMENT OF THE CASE.

The opinion of the Court of Appeals contains a detailed recitation of the substantive and procedural facts of the case which is adequate to address the issues raised by Olsen.

D. ARGUMENT

1. The jury instructions on felony murder and accomplice liability correctly stated the law, and the Court of Appeals opinion does not conflict with previously published cases. The facts of the case do not support Olsen's suggested reading of those instructions.

Olsen asserts that the decision of the Court of Appeals in this case conflicts with decisions in State v. Roberts, 142 Wn.2d 471, 14 P.3d 713 (2000), and State v. Cronin, 142 Wn.2d 568, 14 P.3d 752 (2000). Both of those cases hold that the accomplice must have knowledge of *the* crime for which he is being held accountable, not for other crimes committed by the principal. The State does not dispute that this is the law, nor did the Court of Appeals find differently.

Olsen argues that the jury could have believed Frazier and Sublett killed the victim before Olsen was even released from jail but convicted him of felony murder because he later participated in burglaries of the victim's home. This is a strained interpretation of the instruction that is totally unsupported by the evidence.

Instruction 11 informed the jury that first degree felony murder occurs when connected with first degree burglary, first degree robbery, or second degree robbery. Appendix D to Olsen's Petition for Review. A death caused in the course of, in furtherance of, or in immediate flight from any other crime is not first degree murder. The evidence presented in the case is that there was only one robbery, the one in which Totten was killed. The jury could not have thought that Olsen or any accomplices committed some other

robbery of either degree. Similarly, there was no other first degree burglary. For that crime to occur, one of the participants must either be armed with a deadly weapon or commit an assault. There was no evidence that in any burglary which occurred after Totten's death that a deadly weapon was present or that an assault occurred. The only crime that could have supported the felony murder charge was the first degree burglary/first degree robbery during which Totten was killed. If the jury did not believe he was present during that event, they would have acquitted. But the plain language of the instructions, read as a whole, did not permit the jury to make the mistake that Olsen claims.

The instructions given to the jury correctly stated the law. The facts do not support the interpretation that Olsen argues the jury could have given them. Neither the trial court nor the Court of Appeals committed error.

2. The trial court's refusal to instruct the jury on second degree manslaughter as a lesser included offense of either first degree premeditated murder or first degree felony murder was correct.

The State has no dispute with the law regarding lesser-included offenses, as set forth in Olsen's petition for review, nor does it dispute that both the Washington and United States

constitutions guarantee a defendant the right to such an instruction when each element of the lesser offense is a necessary element of the greater charged offense and when the evidence supports the inference that the lesser, and only the lesser, offense was committed. State v. Huyen Bich Nguyen, 165 Wn.2d 428, 434, 197 P.3d 673 (2008).

Manslaughter is a lesser included offense of premeditated first degree murder. State v. Schaffer, 135 Wn.2d 355, 357-58, 957 P.2d 214 (1998). Had Olsen presented evidence that he was guilty only of manslaughter, he would have been entitled to such an instruction. However, the evidence did not support that inference.

Olsen argues that he reasonably believed that Totten might have been alive when he entered the house for the first time, hours or days after Sublett and Frazier had beaten, restrained, and strangled Totten, but the evidence at trial shows that to have been impossible. Totten was manually strangled. [06/05/08 RP 373-74] Pressure was applied to his neck for some time exceeding three to five minutes before death resulted. [06/05/08 RP 377, 379] There was no possibility that Totten was alive when the killer removed his or her hands from around his neck. It would have been impossible

for Olsen to report the attack in time to prevent death, and thus his failure to do so did not cause death.

Nor was there any evidence that Olsen could have reasonably thought Totten was alive. He either testified in court or told the police that he never heard Totten speak or saw him move. [06/16/08 RP 855] He saw only Totten's foot at the time the body was being moved. [06/11/08 RP 802-3; 06/16/08 RP 893] He testified that there was a bad smell, like gas odor, when the body was being moved. [06/11/08 RP 836-37; 06/16/08 RP 853] Frazier also testified that there was a smell associated with the body. [06/16/08 RP 938] There was no evidence presented that Olsen ever asked if Totten was still alive or took any action whatsoever that would be an indication that he actually thought Totten might still be alive.

In any event, even if he had been entitled to such an instruction, any error would be harmless because he was acquitted of premeditated murder. He was convicted only of felony murder, and manslaughter is not a lesser-included of felony murder. Schaffer, 135 Wn.2d at 358. Because he was not entitled to the lesser-included instruction on the only charge for which he was convicted, he has not suffered any harm.

In Schaffer, the defendant was tried for premeditated murder and second degree felony murder. He asked for a lesser-included instruction for manslaughter, which the trial court refused. Schaffer was acquitted of premeditated murder but convicted of second degree felony murder. The Court of Appeals affirmed, but the Supreme Court reversed, finding that manslaughter is a lesser-included offense of premeditated murder and that the evidence supported an inference that only manslaughter was committed. The Supreme Court further held that on remand, Schaffer could be retried only for felony murder, for which manslaughter is not a lesser-included offense, but nevertheless the jury should be instructed on manslaughter as a "lesser offense" of second degree felony murder. Schaffer, 135 Wn.2d at 358-59.

In this case Olsen was acquitted of premeditated murder, but the facts did not support lesser-included instructions for manslaughter. Even if this court were to find that he was entitled to such an instruction, the State asks this court to revisit the holding that he should be allowed the lesser-included instruction for manslaughter on retrial. He was acquitted of the only alternative for which manslaughter is a lesser-included offense; if there was error at the trial court level it was harmless because he suffered no

prejudice from it. It is unclear why giving the manslaughter instruction in a retrial on a felony murder charge, for which it is not a lesser-included offense, compensates a defendant for a failure to give it in connection with a charge for which he was acquitted. It essentially allows him a chance to be convicted of a lesser-included offense of a crime for which the State cannot retry him.

Because Olsen did not present facts that supported a lesser-included instruction for manslaughter in either the first or second degree, his conviction should be affirmed.

3. Defense counsel was not ineffective for failing to offer standard lesser-included instructions. For both premeditated murder and felony murder, either the law or the facts do not support such instructions.

RCW 10.61.003 provides:

> Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

An instruction for an inferior degree offense is properly given when:

> (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3)

> there is evidence that the defendant committed only the inferior offense.

Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000). "Specifically, we have held that the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense." Id., at 455, emphasis in original.

Olsen argues that his attorney should have offered lesser-included instructions for second degree murder, first degree manslaughter, and a correct instruction for second degree manslaughter. However, manslaughter is not a lesser-included offense of felony murder. State v. Dennison, 115 Wn.2d 609, 627, 801 P.2d 193 (1990).

Manslaughter in the first and second degrees can be lesser-included offenses of premeditated first degree murder. State v. Schaffer, 135 Wn.2d 355, 357-8, 957 P.2d 214 (1998), but only if the facts support the inference that only the lesser included offense was committed to the exclusion of the greater. The Court of Appeals correctly found that Olsen presented no evidence whatsoever that he had any reason to believe that Totten was alive at the time he was first in the house, which he claimed was after Totten had been bound, beaten, and strangled. The pathologist's

testimony was that Totten would have been dead when the killer's hands left his neck. [06/05/08 RP 377-79] Not only was there no evidence to find that Olsen reasonably believed that Totten was still alive, it was physically impossible for him to have lived after the strangulation. Olsen was not entitled to instructions for manslaughter in either degree, and it was not ineffective assistance of counsel for his attorney to fail to request them, or request them in a correct form.

Similarly, the facts did not support a lesser-included instruction for murder in the second degree. He denied any intent to commit murder, premeditated or not. Second degree felony murder, RCW 9A.32.050(1)(b), addresses deaths caused in the course of, furtherance of, or in immediate flight from any felony not enumerated in the first degree felony statute, RCW 9A.32.030(1)(c). However, to be entitled to a lesser-included instruction for second degree felony murder, the facts would have to support an inference that some felony other than first or second degree robbery or first degree burglary was committed, and to the exclusion of those crimes. Fernandez-Medina, 141 Wn.2d at 455. He did not do that. Any crimes other than first or second degree

robbery or first degree burglary were committed after the victim was dead, and there was no evidence to the contrary.

Olsen's counsel was not ineffective for failing to offer an instruction for second degree murder.

4. The trial court's response to a jury question did not violate Olsen's right to a public trial under either the state of federal constitution.

Olsen claims that the trial court conducted an *in camera* hearing to determine how to respond to a jury question. The record does not support the conclusion that this in fact occurred. Counsel for both parties were present and there is no indication where the conference was held or that the courtroom was closed. [Sublett CP 71].

Olsen also argues that the decision of the Court of Appeals conflicts with State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). However, the Bone-Club court was addressing the issue of "a trial court's responsibility to protect a defendant's right to a public trial under article 1, section 22 of the Washington constitution in the face of the State's motion for full closure of a criminal hearing." Bone-Club, 128 Wn.2d at 256. While cases such as Bone-Club are routinely applied to other situations, and holdings are often expanded, the State has not located any cases which stand for the

proposition that a question submitted by a deliberating jury falls into the same category as a State motion to close a suppression hearing to the public. The Bone-Club court was simply not considering this particular situation and there is no apparent reason to stretch that holding to cover it.

A defendant's right to a public trial does require that the court be open during adversary proceedings, which include evidentiary phases of the trial, suppression hearings, voir dire, and jury selection. State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008). Olsen maintains that a hearing on the need for further jury instructions is adversarial because of language in State v. Becklin, 163 Wn.2d 519, 182 P.3d 944 (2008), that the trial court gave further instructions following argument from both sides. Id., at 524. Sadler does not include a judge's consideration of a question from the jury in its list of adversarial proceedings, nor has the State located a case which does.

Even if this sort of argument is what is meant by "adversarial," that is not the only consideration regarding whether a proceeding must be held in open court. "A defendant does not . . . have the right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts." Sadler,

147 Wn. App. at 114. Additionally, because questions from the jury are part of the jury's deliberations, it is even less appropriate to consider the court's response to them to be adversarial. The Court of Appeals cited to a number of cases supporting its conclusion that jury deliberations are not historically considered a public part of the trial. State v. Sublett, 156 Wn. App. 160, 182, 231 P.3d 231 (2010).

The right to a public trial does not extend to purely ministerial or procedural matters, ones that do not involve the resolution of disputed facts. State v. Sadler, 147 Wn. App. at 114. The court's response to the jury question was a legal matter, not requiring a decision about the facts.

> Public trial rights "ensure a fair trial," "foster the public's understanding and trust in our judicial system, and to give judges the check of public scrutiny." None of these purposes is served by eliminating a trial judge's discretion to handle ministerial or purely legal matters informally in chambers. Rather, public trial rights apply to "adversary proceedings," including presentation of evidence, suppression hearings, and jury selection. The resolution of "'purely ministerial or legal issues that do not require the resolution of disputed facts'" is not an adversary proceeding.

State v. Ticeson, No. 63122-5-I, slip op. at 9 (Washington Court of Appeals), internal cites omitted.

Olsen has not provided any reason that this court should apply the holding of Bone-Club, which dealt with the complete

closure of the courtroom during a suppression hearing, to a trial court's consideration of a jury question made with input from counsel from both sides. Even if this consideration did occur *in camera*, which is by no means certain, it did not violate Olsen's public trial right.

5. The trial court was correct in refusing to provide supplemental jury instructions following a question from the jury; there was no due process violation.

Olsen maintains that the court was required to provide supplemental instructions to the jury following a question which expressed confusion about the correct interpretation of the accomplice liability instruction. However, because the instruction was a correct statement of the law, and Olsen does not claim that it is not, there is no requirement that a court issue further instructions.

Olsen cites to State v. Carter, 154 Wn.2d 71, 109 P.3d 823 (2005), for the principle that a jury's misunderstanding of the law taints the verdict. Id., at 84-85. Apart from the fact that this assertion comes from the dissent in the Carter opinion, the issue in that case was the use of the term "a crime" as opposed to "the crime", which has been the subject of numerous appellate cases. The conclusion of the majority was that while the given instruction was incorrect, it was, under the circumstances of that case,

harmless error. Id., at 83-84. Therefore, the Carter decision does not advance Olsen's argument. Olsen also cites to State v. Depaz, 165 Wn.2d 842, 204 P.3d 217 (2009), to support his assertion that the trial court's refusal to give a supplemental instruction was "manifestly unreasonable." What the Depaz court said was, "'A court abuses its discretion when an 'order is manifestly unreasonable or based on untenable grounds.'" Id., at 858, citing to State v. Quismundo, 164 Wn.2d 499, 461, 859 P.2d 60 (1993). The Depaz decision concerned the dismissal of a deliberating juror, not the response to a jury question, and also does not support Olsen's argument.

The court below was correct in holding that the trial court had no duty to further clarify a correct statement of the law contained in a jury instruction that has never been found to be ambiguous. The problem was not that the jury could have interpreted the instruction incorrectly but that the jury had perhaps not read it carefully. There is always the possibility that a jury may misinterpret instructions. However, the thought processes of individual jurors and the jury as a whole inhere in the verdict and cannot be used to impeach the verdict. State v. Ng., 110 Wn.2d 32, 43, 750 P.2d 632 (1988).

The trial court has considerable discretion to give or refuse further instructions to a deliberating jury. Id., at 42. The court here did not abuse its discretion.

6. The trial court did not abuse its discretion by denying his motion for a new trial. The affidavit of Katrina Berchtold did not provide newly discovered material evidence.

The criminal court rules provide that the trial court may grant a new trial under certain circumstances. CrR 7.5(a). Olsen contends that the affidavit of Katrina Berchtold satisfies CrR 7.5(a)(3):

> Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at trial.

Katrina Berchtold also went by the name of Alexis Cox. The report of proceedings includes several references to her by the defense; she was not unknown to them. [06/11/08 RP 813, 06/17/08 RP 1025]. There is nothing in the record that indicates Olsen could not have obtained this affidavit before trial.

The "evidence" was not material. It was nothing more than impeachment of April Frazier, and cumulative impeachment at that. It was also, as argued in the State's response brief in the Court of Appeals, not particularly trustworthy. State's response brief at 55.

The trial court did not abuse its discretion by denying Olsen's motion for a new trial.

7. The trial court correctly admitted unedited recordings of phone conversations between Olsen and April Frazier.

Olsen maintains that the unedited recordings of his phone conversations with April Frazier were unduly prejudicial. A trial court has wide discretion to balance the prejudicial effect of evidence against its probative value. State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). The trial court did not abuse that discretion.

In the same way that a picture is worth a thousand words, sometimes an actual recording of a conversation can reveal information that a summary could not. Such was the case here. While the trial court did not conduct an on-the-record analysis of the probative vs. prejudicial value of the evidence pursuant to ER 404(b), that omission is harmless error. Here the record is sufficient to allow a reviewing court to find that the trial court would have admitted the evidence even if it had done a balancing analysis. State v. Carleton, 82 Wn. App. 680,686-87, 919 P.2d 128 (1996) The recordings were independently admissible under the res gestae exception to ER 404(b). There was no error.

8. The trial court correctly excluded evidence of the content of a conversation between Totten and his neighbor.

The trial court allowed Totten's neighbor, Todd Rayan, to testify that Totten had spoken to him about obtaining a restraining order, but excluded testimony that he sought the restraining order against Frazier because he suspected her of stealing from him. The court was within its discretion to do so. First, the proffered testimony [06/12/08 RP 9-10] did not specify a time period, and there was no other evidence that the conversation between the neighbors happened at a time that was relevant to the issues before the trier of fact. Second, it was not relevant because there was no evidence that Frazier was ever aware that the conversation had happened. Even if she knew about it, it was offered to prove that Frazier had a motive to kill Totten, something the State never disputed. Much of the State's evidence concerned Frazier's and Sublett's plans to rob and murder Totten. The conversation between Totten and Rayan was not relevant. Finally, the Court of Appeals was correct that even if Totten's state of mind was relevant, conversations that created that state of mind are not admissible. Sublett, 156 Wn. App. 199, citing to State v. Parr, 93 Wn.2d 96, 104, 606 P.2d 263 (1980). The trial court did not err.

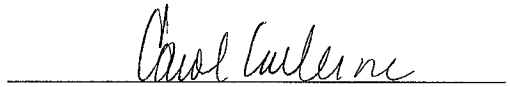
9. It was not error for the trial court to answer a jury question in the defendant's absence.

A defendant has the right to be present at all critical stages of his proceedings. A critical stage occurs when evidence is being presented or whenever the defendant's presence has "a relation, reasonably substantial," to the opportunity to defend against the charge. In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). The Court of Appeals correctly held that a conference between counsel and the court in response to a question from the jury is not a critical stage of the trial. Sublett, 156 Wn. App. at 182-83.

E. CONCLUSION.

The trial court did not commit the errors which Olsen claims, nor was the Court of Appeals in error when it affirmed his conviction. The State respectfully asks this court to affirm the Court of Appeals.

Respectfully submitted this 24th day of January, 2011.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Supplemental Brief of Respondent, on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 25th day of January, 2011, at Olympia, Washington.

Chong McAfee